United States Court of Appeals

for the Second Circuit

AMICUS BRIEF

75-7159

United States Court of Appeals

For the Second Circuit

INTERNATIONAL ELECTRONICS CORPORATION AND ELECTRO MOTIVE CORPORATION,

Plaintiffs-Appellees-Cross Appellants,

against

JOSEPH FLANZER, JULIUS APTER, JOHN SINDER, SAUL LEWIS, IRVING BEIN, PHILIP BEIN; JULIUS APTER, MORRIS APTER and NICHOLAS A. LENGE, d/b/a APTER, NAHUM & LENGE,

Defendants-Appellants-Cross Appellees,

J. KEVIN FOLEY,

Defendant.

BRIEF OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK AS AMICUS CURIAE

The Association of the Bar of the City of New York
42 West 44th Street
New York, N. Y. 10036

Of Counsel:

Committee on Professional and Judicial Ethics
LANA BORSOOK
ROBERT H. M. FERGUSON
NEAL JOHNSTON
JAMES B. LEWIS
BRISCOE R. SMITH

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Code of Professional Responsibility

TABLE OF AUTHORITIES (continued)

Other

This brief is submitted, at the request of Judge Gurfein on behalf of this Court, by The Association of the Bar of the City of New York. We have limited ourselves to setting forth our views as to the requirements of the Code of Professional Responsibility in the circumstances presented.

STATEMENT OF FACTS

The complaint in this action was filed in June 1974 in the United States District Court for the District of Connecticut. It was filed by two corporations, a parent, International Electronics Corporation ("IEC"), and its subsidiary, Electro Motive Corporation ("EMC"), against seven individuals and a law firm named Apter, Nahum & Lenge ("the Apter firm"), of which one of the seven individual defendants either is or was a partner. The action arises from a transaction in which EMC (then named IECONN, Inc.) acquired in a merger for a cash consideration the assets and business of Electro Motive Manufacturing Company Incorporated ("ELMENCO"), which had been owned by the seven individuals. The terms and conditions of the merger were set forth in an Agreement and Plan of Merger dated as of April 19, 1973. The complaint claims that the seven individuals made misrepresentations in the course of the

sale and charges them with violations of the Securities Act of 1933, the Securities Exchange Act of 1934, SEC Rule 10b-5, common law fraud and breach of contract. The Apter firm was named as a defendant because it is the agent of an escrow fund established in connection with the sale and merger. Plaintiffs are seeking payment from this fund and from the individual defendants directly.

In July 1974, the Apter firm filed a joint answer on behalf of six of the seven individuals and on its own behalf. The other individual defendant was separately represented. Included in the answer filed by the Apter firm was a counterclaim on behalf of the firm for legal fees. Of the amount claimed, $8,755 was attributable to the portion of the Apter firm's annual retainer that remained unpaid as of the date of the merger, and the remainder was for services performed "at the request of the Plaintiffs" in connection with the negotiation and consummation of the merger. Plaintiffs' reply contained a general denial of the counterclaim.

In October 1974, plaintiffs moved to disqualify the Apter firm from representing any of the defendants. Plaintiffs alleged that Julius Apter, one of the seven individual defendants and a partner in the Apter firm when the litigation was instituted, had played the principal role in the

negotiation and consummation of the sale and merger, and would be a material witness. Plaintiffs asserted in their motion that the continued involvement of the Apter firm in the litigation would violate Disciplinary Rules 5-101(B), 5-102(A) and 5-105(A) and (B) of the Code of Professional Responsibility.

In response, Julius Apter filed an affidavit in which he stated that he had not practiced law since January 1974 and had retired from practice and from the Apter firm.

In a decision dated February 27. 1975, the Court granted plaintiffs' motion to disqualify Julius Apter and all members of the Apter firm from participating at trial, on the ground that granting the motion would assure compliance with DR 5-101(B), but permitted the firm to conduct the defense until that time. This appeal followed. While the motion before the District Court was limited to Canon 5, plaintiffs broadened their position on oral argument in the District Court and on appeal to include Canons 4 and 9.

PRELIMINARY STATEMENT

We note at the outset that the parties have not considered on appeal the restraints imposed by DR 5-101(A) or DR 5-105, dealing with circumstances impairing the independent professional judgment of a lawyer. Because the

record does not develop the myriad of subtle issues of fact and law essential for a resolution of this often difficult question, we find it inappropriate to consider the matter here. We note, however, that any lawyer undertaking multiple representation, and particularly so in a litigated setting, must be always mindful of EC 5-14 through 5-17, DR 5-101(A) and DR 5-105. A lawyer may represent multiple clients only if it is

> "obvious that he can adequately represent the interests of each and if each consents to the representation after full disclosure of the possible effect of such representation on the exercise of his independent professional judgment on behalf of each." DR 5-105(C)

In addition:

> "Except with the consent of his client after full disclosure, a lawyer shall not accept employment if the exercise of his professional judgment on behalf of his client will be or reasonably may be affected by his own financial, business, property, or personal interests." DR 5-101(A)

See, e.g., Morgan v. United States, 396 F.2d 110, 114 (2d Cir. 1968); ABA Informal Opinion No. 899 (Dec. 11, 1965).

ISSUES CONSIDERED AND CONCLUSIONS REACHED

I.

Should the Apter firm be disqualified under Canons 4 and 9 from representing defendants by reason of

its past representation of ELMENCO? The record indicates that no attorney-client relationship within the meaning of Canon 4 ever existed between the Apter firm and plaintiffs, and we conclude that disqualification is not warranted on this ground.

II.

Should the Apter firm be disqualified under Canon 5 because one of the defendants, who will probably be a material witness at trial, is a former member of the Apter firm? The relevant Disciplinary Rules do not expressly prohibit representation where a former member of the firm will be a material witness, and should not be so extended.

III.

Even if Julius Apter is still considered to be a member of the Apter firm, should the Apter firm be disqualified under Canon 5 from defending itself or him at trial? The relevant Disciplinary Rules do not prohibit self-representation or representation by one's partners.

ARGUMENT

I.

DISQUALIFICATION OF THE APTER FIRM IS NOT REQUIRED UNDER CANONS 4 AND 9 AS PLAINTIFFS ARE NOT ITS FORMER CLIENTS WITHIN THE MEANING OF CANON 4

Plaintiffs seek disqualification of the Apter

firm under Canon 4 on the basis of its long-standing role as counsel to ELMENCO. Plaintiffs argue that by reason of the merger of ELMENCO into EMC the latter corporation succeeded to all rights and obligations of ELMENCO, including the right to prohibit ELMENCO's former counsel from accepting employment in an action adverse to the interests of EMC as ELMENCO's successor and from disclosing confidences that may have been communicated to such attorneys in the course of negotiating the merger.

Canon 4 and the Ethical Considerations and Disciplinary Rules promulgated thereunder make it clear that a lawyer is not to accept employment against a former client where the matters involved are substantially related to the subject matter of his prior representation. EC 4-5 and 4-6; DR 4-101(B). See Emle Industries, Inc. v. Patentex, 478 F.2d 562 (2d Cir. 1973); Consolidated Theatres v. Warner Bros., 216 F.2d 920 (2d Cir. 1954); T.C. Theatre Corp. v. Warner Bros. Pictures, Inc., 113 F.Supp. 265, motion for leave to reargue denied, 125 F.Supp. 233 (S.D.N.Y. 1953). Thus, if the Apter firm had represented either the parent corporation, IEC, or its subsidiary, EMC, in the negotiations leading to the acquisition of ELMENCO, or indeed in any other transaction related to the acquisition, it would be precluded from representing defendants in this action.

In our view, neither plaintiff may claim to be a former client of the Apter firm for purposes of this motion solely by reason of the merger of ELMENCO into EMC. In reaching this conclusion, we have assumed, arguendo, that whatever rights ELMENCO would have had to insist on the Apter firm's disqualification under Canon 4 survived the merger intact,* and that EMC could, for instance, prevent the Apter firm from representing an independent third party in a dispute arising out of a contract that the Apter firm had negotiated on behalf of ELMENCO before the merger.

We are of the opinion that the Apter firm is not now undertaking to represent defendants in an action against a former client. Instead, it has been retained to represent defendants in a dispute arising from the sale of their ELMENCO stock to an unrelated party. That EMC has, by operation of law, succeeded to the ownership of ELMENCO's assets and assumed its liabilities does not affect what in substance occurred in the merger: EMC acquired the ELMENCO business for cash. So viewed, it is clear that plaintiffs

---

* There may be some doubt as to whether a corporation's status as a former client will always survive in a merger. Note, 64 Yale L.J. 917, 918 n.3 (1955). See also comments on T.C. Theatre Corp. v. Warner Bros. Pictures, Inc., supra, in Consolidated Theatres v. Warner Bros., supra at 924-925 n. 4, and 64 Yale L.J. at 927 n.49. In view of the conclusions reached in this brief, we have not considered that question.

did not become, by reason of the merger, former clients of the Apter firm. They are therefore precluded from insisting on the disqualification of the Apter firm under Canon 4.

The only reasonable construction of Canon 4 in this situation is that the Apter firm, in negotiating the merger, represented a community of interests comprised of ELMENCO and its shareholders and that by representing defendants in this action, the Apter firm is continuing to represent those interests and is in no manner taking a position adverse thereto. Marco v. Dulles, 169 F.Supp. 622 (S.D.N.Y. 1959).

As a further ground for seeking to disqualify the Apter firm under Canon 4, plaintiffs contend that the facts alleged in that firm's counterclaim for fees for legal services performed in connection with the merger are tantamount to an admission that the firm acted as counsel for plaintiffs. Although the record is not absolutely clear on this point, there is a strong intimation that the services performed were all on behalf of ELMENCO and its shareholders, and that the counterclaim is an effort by the Apter firm to exact payment for such services from ELMENCO's purchaser rather than ELMENCO's former shareholders. See Defendants' Answers to Interrogatories of Plaintiffs #32(f), (f)(i), (f)(ii), 41,

42(a) and the Exhibits there referred to.*

---

* In its answers to plaintiffs' interrogatories pertaining to the counterclaim, the Apter firm affirmatively stated that it had "represented plaintiffs in connection with the Agreement and Plan of Merger" (Defendants' Answers to Interrogatories of Plaintiffs #32(f)). Included in the services that the Apter firm claimed to have performed for plaintiffs were:

> "Meetings with officers and directors of Elmenco and with Benjamin B. Grossman and his attorneys, many telephone conferences in contemplation of agreement provisions, preparation and mailing of notices and proxies to stockholders, distribution of copies of merger agreement to stockholders and answering inquiries from same, preparation of stockholders and directors meetings in connection with merger, preparation of notices thereof and attendance at meetings, preparation of stock powers and powers of attorney for execution by stockholders, preparation of written opinions to plaintiffs, examination of restrictive agreements and revision of same." Answer to Question 32(f)(i) of Plaintiffs' Interrogatories.

In Question 42 of plaintiffs' interrogatories the Apter firm was also requested to identify all communications, written or oral, by which plaintiffs had requested the Apter firm to perform services in connection with the merger. In response to this interrogatory, the Apter firm referred only to a number of letters from Messrs. Golenbock and Barell, who acted as plaintiffs' counsel in connection with the merger, (i) forwarding drafts of the merger agreement; (ii) requesting from Julius Apter copies of the merged corporation's minutes, stock ledgers and other corporate records, contracts, deeds, etc., to be reviewed by Golenbock and Barell prior to the merger; and (iii) specifying the language that would be required in an opinion letter from the Apter firm with respect to the authorization, execution and sufficiency of a consent to the merger by one of the merged corporation's creditors (Exhibits "D-1" through "D-5" to Defendants' Answers to Interrogatories of Plaintiffs).

If the Court is satisfied that the record on appeal, together with the fact that the District Judge did not grant plaintiffs' motion under Canon 4, is sufficient to support the conclusion that the Apter firm never acted as attorneys for plaintiffs, then we believe that the allegations in the counterclaim ought not to be a ground for disqualification. If the Court finds that the record is insufficient to support that conclusion, then the case should be remanded to the District Court for further findings of fact in this regard.

Plaintiffs also rely on the directive of Canon 9, that a lawyer should avoid even the appearance of professional impropriety, as a ground for disqualifying the Apter firm. If the merger did not have the effect of creating an attorney-client relationship, there is no seeming impropriety in the Apter firm's continued representation of defendants which would subject it to criticism under Canon 9. A similar conclusion is required, in our view, with respect to the counterclaim issue. If the sole reason for the Apter firm's allegation that it represented plaintiffs is to establish a basis for collecting its fee, the making of such allegation is insufficient, in and of itself, to create an appearance of impropriety that would warrant disqualification under Canon 9. If there is more substance to the

allegation than that, disqualification would be required under Canon 4 as well as Canon 9.

II.

IF JULIUS APTER HAS RETIRED FROM THE APTER FIRM, SUCH RETIREMENT REMOVES THIS MATTER FROM THE AMBIT OF DR 5-101(B) AND DR 5-102

There is some confusion in the record as to the precise nature of the present relationship between Julius Apter and the Apter firm. However, if it be assumed (or determined upon remand) that Julius Apter is indeed no longer a member of the Apter firm, it is our opinion that DR 5-101(B) and DR 5-102 do not disqualify the firm.

Disciplinary Rules 5-101(B) and 5-102 do not expressly prohibit a firm from appearing where a former member of that firm may be a material witness. Rather, the Rules cover the situatior where the lawyer retained knows that he "or a lawyer in his firm ought to be called as a witness." The question here then is whether the Rules should be extended by interpretation to cover the "former partner" situation not expressly encompassed by the language of the Rules.

It is our opinion that there are at best tenuous logical supports for the present express prohibition against an attorney accepting employment because one of his present

partners will be a witness. The scope of the prohibition should not be mechanically extended unless [illegible] logic can justify the result. Since we can find no compelling ethical argument for extending the prohibition to compel disqualification wherever a former partner will be a witness (especially where, as here, such former partner/witness is also a party) we conclude that the disqualification order below was in error.

What then is the logic of DR 5-101(B) and DR 5-102? The fact is that there is no widespread agreement on the answer to this question. A variety of different justifications have been proposed; some of them verge on the contradictory.

Perhaps the best known formulation of the underlying principles is found in 6 Wigmore, Evidence § 1911 (3d ed. 1940). Dean Wigmore outlines three distinct sorts of arguments against permitting counsel to serve his client as witness. Two of the three he dismisses almost out of hand. One, the general principle of disqualification by interest, is obsolete. The Dean acknowledges the equal unimportance of the fear that

> "the testimony of the counsel and his statements in argument might be so identified in the minds of the jury that they might be too ready to give to the argument a testimonial credit and effect, as if the oath of the counsel as witness were pledged to it, and thus be unduly impressed with its weight."

The best justification for the Rules, in Dean Wigmore's judgment, is the dangerous effect of any such practice upon the public mind:

> "In short, it does not fear that lawyers may as witnesses disrupt the truth in favor of the client but it fears that the public will think that they may, and that the public's respect for the profession and confidence in it will be effectively diminished. This is at once the most potent and the most common reason judicially advanced." (footnote omitted)

In other words, the specter of the testifying advocate smacks of the sort of apparent professional impropriety which is condemned by Canon 9.

We believe that the Canon 9 concerns implicit in Canon 5 are effectively attenuated if Julius Apter has in fact retired from his former partnership and from the practice of law. In these circumstances, the relationships are too remote to warrant disqualification on the basis of what the public might perceive to be an impropriety.

Plaintiffs, however, argue that the fact of Julius Apter's severance from his former firm is ethically irrelevant. Their key contention seems to be that Julius Apter's retirement does not eliminate the "ethical problem of the Apter firm being regarded as something more than disinterested professional advocates." (Pl. Br., p. 27.) We think that this is no proper test and that the Code does not require so much. If an advocate were required to avoid the

appearance of anything more than professional disinterest, then the Canons would, by necessary implication, prohibit a lawyer from ever appearing pro se, or on behalf of any member of his immediate family, or in any other cause where his personal and nonprofessional interests were apparent. The Canons, quite wisely, are simply not so restrictive.

Another frequently suggested basis for the Rules is that normally it is not in a client's best interest for his advocate to testify. The advocate/witness is subject to special impeachment because of the interest such a witness may have, as advocate, in the outcome of the case (see EC 5-9). The advocate who testifies may injure his client's cause because the true weight of his testimony may be incorrectly underestimated by virtue of his special susceptibility to impeachment.

Certainly, the attorney/witness must inform his client that the effectiveness of his testimony may be diminished as a result of the double function he is serving, and must be prepared to withdraw as counsel in order to preserve for his client the full effective force of his testimonial contribution. However, sometimes, as the Code appears to contemplate, an informed client may properly (and perhaps even wisely) conclude that the value of a particular attorney to him as trial counsel outweighs whatever loss in

effectiveness that attorney's testimony might have should the attorney continue in the double role of advocate/witness.

The notion that Julius Apter's credibility might be needlessly impeached because his former partners are trial counsel goes too far. The fact is that Julius Apter is absolutely, vitally, transparently and necessarily interested in the outcome of this case as a party. He is a defendant in a multimillion dollar action charging him with fraud. There is no possibility that Julius Apter could be taken for a disinterested witness. In such a situation, it is difficult to see how his credibility could be additionally attacked as a result of his representation by his former law firm.

Another justification for the Rules turns on the fact that, theoretically, any witness may turn out to supply that very datum of evidence which ultimately destroys the case of the party who calls him. An advocate's testimony may advance his client's case, but, conceivably, he might also undermine it irreparably. While it may not be intrinsically unethical for an advocate to become, in effect, an engine of destruction for his own case, nevertheless the apparent impropriety of such an act is clear enough--and, normally, ought not to be risked. However, no such theoretical possibility is present in this case. We do not believe

that a reasonable layman would think it improper if evidence injurious to one party's claims were brought out through the testimony of a witness who at some prior time had been the partner of that party's present attorney. The connection is too remote. Moreover, where as here, this potentially injurious former partner/witness is himself the very party who risks such injury, the entire issue becomes circular and rolls away. If Julius Apter should eventually prove plaintiffs' case out of his own mouth, we think the legal profession would suffer no loss of stature from a public awareness of the fact that Julius Apter was once a partner in the Apter firm.

Not all of the reasons justifying the Disciplinary Rules flow from the nature of the duties an advocate owes to his client. He also owes duties to the profession, to the court, and to his immediate adversaries.* Thus, EC 5-9 states:

> "If a lawyer is both counsel and witness . . . the opposing counsel may be handicapped in challenging the credibility of the lawyer. . . ."

Professor John F. Sutton, Jr., in his oft quoted article, The Testifying Advocate, 41 Tex. L. Rev. 477, 480 (1963),

---

* For example, mechanical reasons are also sometimes advanced in justification of the Rules, usually envisioning an advocate/witness asking questions in his capacity as advocate and then answering himself as witness. However, no such mechanical problems would be involved in permitting the present members of the Apter firm to ask questions of their former partner, Julius Apter.

dismisses the notion that DR 5-101 was designed to protect the other side from unfair disadvantage as "one of the least impressive" that might be advanced. When a single lawyer serves as advocate/witness, the ingrained habits of professional courtesy may impede opposing counsel's attack upon the advocate's credibility as witness. However, it is a great leap from that situation to the one at hand where the advocate and the witness will be two different men, and indeed men who are no longer partners. The complaint here accuses Julius Apter of fraud; we do not believe that plaintiffs' possible attack upon Julius Apter's credibility will in any way be diminished in scope or effectiveness by the presence of Julius Apter's former law partners as his present counsel. Plaintiffs make no persuasive showing that they will be in any way improperly injured by the non-disqualification of the Apter firm. In this factual context, the point is too precious to justify depriving defendants of the attorneys of their choice.

The fact that one or more of the justifications for the Disciplinary Rules may be inapposite here is not in itself controlling. What does determine our opinion is our inability to imagine any apposite justification. To disqualify the Apter firm from representing Julius Apter and five other defendants here because Julius Apter was once

a member of the Apter firm, in the absence of any express provision in the Code covering such situation, would seem to serve no logical or ethical end.

III.

AN ATTORNEY SHOULD NOT BE DISQUALIFIED FROM SELF-REPRESENTATION ABSENT EXTRAORDINARY CIRCUMSTANCES NOT SHOWN TO BE PRESENT HERE

Julius Apter should not lightly be denied his choice of counsel in this action merely because he will be a witness on his own behalf. Even if he were found still to be a member of the Apter firm, his status as a witness should not prevent him from turning to his partners for his defense. Nor should the Apter firm be denied the right to represent itself.

The commonplace practice of self-representation indicates that the profession does not believe it to be presumptively unethical for an attorney to represent himself in criminal or civil matters--whether or not it will be necessary for him to testify in the course of his case.

The very language of DR 5-101(B) suggests that its draftsmen did not have the self-representation situation in mind when they wrote it. Thus, the Rule provides that a lawyer shall not accept "employment"--a curious word to

apply to an attorney's decision to appear on his own behalf. However, the source of the implicit self-representation exception here discussed rests not so much on linguistic analysis as it does on observation of actual and seemingly unchallenged practices of the profession over many years.

It is a standard practice for members of law firms to render legal services to their immediate colleagues. Thus, a firm or one of its members will frequently appear on behalf of a partner or associate in connection with a matrimonial dispute, a landlord/tenant controversy, an adoption proceeding, an estate administration, a tax case, or perhaps even a disciplinary matter, even though the attorney/party involved will often be a witness. It is clear from actual practice that the profession has not regarded Canon 5 as requiring such an attorney/party to go outside his firm for representation. Indeed, if Canon 5 were read generally to prohibit self-representation, an attorney who received a parking summons which he wished to contest by means of his own testimony would be required to obtain independent counsel to represent him. Obviously, the Canon has never been so read.

In this general connection, we are aware of one case worthy of special attention: Marco v. Dulles, 169 F.Supp. 622 (S.D.N.Y. 1959). While Marco is readily distinguishable from the facts at hand, it is nonetheless illuminating.

Marco was a stockholders' derivative suit charging former directors of Blue Ridge Corporation with wrongful diversion of corporate assets. Among the defendants in the action was John Foster Dulles, who, at the relevant times, had been a senior partner of Sullivan & Cromwell, which firm had represented both the directors of Blue Ridge and Blue Ridge itself. In Marco, however, Sullivan & Cromwell appeared only for the individual directors, including Mr. Dulles, then Secretary of State. At some point, after control of Blue Ridge had passed to other hands, its successors in interest moved to disqualify Sullivan & Cromwell from appearing in Marco on behalf of Dulles and the other individuals. They urged that since the firm had represented Blue Ridge as well as the directors, representation of the directors in an action where their interests were adverse to those of the corporation would violate those provisions of the Canons which deal with the obligation of counsel to preserve inviolate his client's secrets and confidences, and which forbid subsequent retainer by others in matters adversely affecting any interest of the client with respect to which confidence has been reposed.

District Judge Bryan denied the motion on the following ground (169 F.Supp. at 630-631):

In this case the defendant directors are being accused of what is tantamount to fraud in connection with the transactions under attack. Sullivan & Cromwell plainly were responsible for advising as to the legality of such transactions which were concededly entered into on their advice. It was their professional obligation, in so far as the facts were known to them, to vouch professionally for the legality of the transactions that were entered into. Such legality, in terms of dealings between the corporation and its directors, necessarily implied that the transactions were not tainted with fraud or impropriety.

The attempt to set aside these transactions upon the ground of fraud necessarily implies an accusation by the plaintiff not only against the directors who were clients of Messrs. Sullivan & Cromwell, but against Messrs. Sullivan & Cromwell themselves in their professional capacity as the lawyers in these transactions. Moreover, the accusations are direct as well as implied. The then senior partner of Sullivan & Cromwell is named as a defendant in the action and is alleged to have been a participant in the frauds charged. It is true that he is not expressly charged with fraud in his professional capacity. But his acts as a director cannot be separated from his acts as a member of the firm who were general counsel for the corporation. The line between the two is entirely too fine to permit the professional obligation as a lawyer and the fiduciary obligation as a director to be placed in convenient separate boxes.

* * *

Canon 37 expressly provides that "if a lawyer is accused by his client, he is not precluded from disclosing the truth in respect to the accusation". Here the firm of Sullivan & Cromwell is being accused of fraud by plaintiff purporting to derive his cause of action from its former client Blue Ridge Corporation. The firm is entitled to use all the knowledge at

> its disposal to protect itself against such accusations. The accusations relieve the defendant senior partner of Sullivan & Cromwell, and Sullivan & Cromwell themselves, from any duty not to disclose or to use such confidences, if any, as may have been reposed in them in the course of the transactions under attack.
>
> Their present position, while it may be adverse to the present interests of the former client or its successor, is not adverse to or inconsistent with the advice which they previously gave to the corporation. To defend themselves and their senior partner it is necessary and proper for Sullivan & Cromwell to do all they legitimately can to affirm the transactions upon which they are accused of fraud, and to supply all the ammunition which they have whether it came to them in confidence or not. (footnote omitted)

Marco did not directly consider the attorney/witness problem--probably because the then controlling version of what is now DR 5-101(B), former Canon 19, did not on its face disqualify a law firm whenever one of its members, other than trial counsel, might be a witness. However, if, as Judge Bryan seems to have held, Sullivan & Cromwell was so much a quasi-defendant as to justify excusing it from many of the confidentiality requirements of the Code, and since Marco clearly contemplates that Sullivan & Cromwell would properly undertake to defend itself therein, very possibly through the testimony of one or more of its past or present partners, it is obvious that Marco was rife with implicit Canon 5 concerns.

The analogue between the position of Sullivan & Cromwell in Marco and the Apter firm here is clear. The instant complaint necessarily implies grave accusations

against the Apter firm. The professional reputation and standing of that firm seem on the line. In such circumstances, as in Marco, fine and formal distinctions lose some significance. It would not serve the fundamental interests of justice to exclude the Apter firm from active participation in the trial either in defense of itself or in defense of Julius Apter, at least as long as Julius Apter wishes them to represent him.

One gap remains in this approach. We have concluded that if Julius Apter is deemed still a member of the Apter firm for purposes of this motion, he can properly be represented by that firm on the ground of an implicit self-representation exception inherent in DR 5-101. However, since his codefendants are not members of the Apter firm, their representation by that firm cannot be directly justified on this ground.

Therefore, although the Apter firm may represent all the individual defendants if Julius Apter is not a member of the firm (see p. 19, supra), it may be disqualified from representing anyone other than Julius Apter if he is still a member of the firm. The latter result, while seemingly anomalous and wasteful, appears to be required by DR 5-101(B) unless it be established that it would be an unreasonable hardship upon the other individual defendants pursuant to DR 5-101(B)(4) to preclude

the Apter firm from representing them while the firm is active in the case as counsel to Julius Apter and to itself.

While the record on appeal is sparse, it does not appear that defendants below made a showing that would bring this case within the "hardship" exception of DR 5-101(B)(4). However, common experience suggests that, even though the burden of persuasion should be upon those who would invoke the hardship exception, a showing of hardship might have been made. If this case be remanded for any of the reasons here suggested, it might be appropriate for some testimony to be focused on the hardship issue.

Respectfully submitted,

The Association of the Bar of
the City of New York,
Amicus Curiae
42 West 44th Street
New York, N. Y. 10036

Of Counsel:

Committee on Professional
and Judicial Ethics
Lana Borsook
Robert H. M. Ferguson
Neal Johnston
James B. Lewis
Briscoe R. Smith

at the trial

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

- x

INTERNAL ELECTRONICS CORPORATION AND ELECTRO MOTIVE CORPORATION,

Plaintiffs-Appellees-Cross Appellants,

-against-

JOSEPH FLANZER, JULIUS APTER, JOHN SINDER, SAUL LEWIS, IRVING BEIN, PHILIP BEIN, JULIUS APTER, MORRIS APTER and NICHOLAS A. LENGE, d/b/a APTER, NAHUM & LENGE,

Defendants-Appellants-Cross Appellees,

J. KEVIN FOLEY,

Defendant.

- x

AFFIDAVIT OF SERVICE

Docket No. 75-7159

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

ALAN BISCHOFF, being duly sworn, deposes and says:

I am over the age of 18 years and am not a party to this action.

On October 1, 1975, I served the within Brief Amicus on the attorneys listed below by depositing two true copies thereof, securely enclosed in a post-paid wrapper addressed to each of such attorneys at their respective addresses, in a mail-box maintained by the Government of the United States at One Chase Manhattan Plaza, New York, N.Y.

Morris Apter, Esq.
Arnold E. Buchman, Esq.
Apter, Nahum & Lenge
101 Pearl Street
Hartford, Connecticut 06103

M. T. H. & M.

and as a firm which he was a partner of the law firm that

J. Read Murphy, Esq.
Murtha, Cullina, Richter
and Pinney
P. O. Box 3197
101 Pearl Street
Hartford, Connecticut 06103

Alan Bischoff

Sworn to before me this

1st day of October, 1975.

Steven J Kroleski

STEVEN L. KROLESKI
NOTARY PUBLIC, State of New York
No. 41-2205556
Qualified in Queens County
Certificate filed in New York County
Commission Expires March 30, 1977